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IN THE  
Supreme Court of the United States  
OCTOBER TERM, 1978

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No. 78-598

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LOUISVILLE & NASHVILLE RAILROAD COMPANY and  
STEVE HAVARD,  
Petitioners,

versus

RHEETA HASTY, A Minor, By and Through Her Mother  
and Next Friend, MRS. FAYE HASTY,  
Respondent.

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ON PETITION FOR A WRIT OF CERTIORARI  
TO THE SUPREME COURT OF MISSISSIPPI

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RESPONSE TO REPLY BRIEF

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Petitioners cannot allow certain misstatements and  
erroneous conclusions of the Reply to go uncorrected.

**JURISDICTION**

The Reply contends that Equal Protection and Due  
Process were not properly raised in the Courts below.

Not only do the items cited in the Appendix to the Petition show to the contrary, but also in the early stages before the trial court, the Fourteenth Amendment was specifically raised. (See Motion to Dismiss, Appendix to Reply Brief.) The Reply thereafter concedes that the Fourteenth Amendment was raised at several early stages in the trial court, but, surprisingly, contends that there was no specific mention of Equal Protection and Due Process at that point. The Fourteenth Amendment to the Constitution of the United States is nothing if it is not a guarantee of Due Process and Equal Protection. These two guarantees comprise the entire amendment.

The denial of constitutional rights under the Fourteenth Amendment was raised (1) before trial in the Chancery Court, (2) on post-trial motion in the trial court, (3) on assignment of error in the Mississippi Supreme Court, (4) on brief and oral argument and (5) on petition for rehearing.

Also, as was shown in our Petition, the District Court for the Southern District of Mississippi handed down its decision holding the Mississippi attachment in chancery statute unconstitutional under the Fourteenth Amendment, on November 27, 1977, after briefing was completed and prior to oral argument in the Mississippi Supreme Court. *Mississippi Chemical Corporation v. Chemical Construction Corporation*, 444 F.Supp. 925 (S.D.Miss.1977). The Court noted that Petitioners had brought that case to its attention, but the Court declined to follow it.

The Reply urges, procedurally, that Petitioners made a general appearance at the same time the motion to dismiss was filed, and, somehow, presumably, weakened the purpose of the motion. The motion, along with other objections, was filed prior to answer, and, therefore, was required to be ruled upon before Petitioners could be put to trial; moreover, the statute in Mississippi, Section 11-31-1, Mississippi Code, 1972, (Petition, 17a), says that mere service of the attachment process on the defendant will support *in personam* judgment the same as if personal or general appearance had been made. The only way to prevent it is to appear. Finally, no issue or question of special appearance versus general appearance under state procedure was ever made at any point by Respondent.

### SUPPLEMENTAL FACTS

The Reply incorrectly states that "the record clearly shows" that no assets were interfered with. The assets, personal and real, listed in the attachment (Petition, 8) were effectively attached under Sections 11-31-3 and 11-31-5 (Petition 17a-18a) the moment the process was served. Nowhere does the record reflect that attachment was ever released, although it later did develop that the Respondent was satisfied without physically holding railroad property after appearance was made.

Part of the constitutional problem with the statute is the fact that there is automatic pre-judgment attachment without notice.

## ARGUMENT

This court should not be misled by the legalistic arguments Respondent makes to support the effective denial of justice being inflicted upon the Petitioner under the Mississippi attachment in chancery statutes. Section II of the Reply points up the absence of just support for Respondent's argument and the fact that as to L & N, the Mississippi attachment in chancery statutes serve only "to protect its citizens" from trial by a jury of their peers in a civil action for damages. The Reply, and especially Section II thereof, demonstrates there would be no other purpose in bringing this action in Chancery, unless it would be to have a particular judge.

Moreover, the context within which this action has been maintained demonstrates the manifest injustice being perpetrated upon Petitioners and others in Mississippi, and the urgent need for this court to take jurisdiction, find the Mississippi attachment in chancery statutes unconstitutional on their face and in their application to L & N and bring to a halt further proceedings in Chancery involving this and the other cases arising out of the same accident. It would further bring to a halt this on-going and continuous process of prejudgment attachments of non-resident, domesticated corporations for purposes of obtaining non-jury civil judgments.

The instant case involving Rheeta Hasty is one of six suits which have been filed arising out of a railroad

crossing accident at Gulfport, Mississippi, on April 21, 1973. A Ford van being driven by Richard Hasty was struck by an eastward freight train at a grade crossing in Gulfport, Mississippi. In that accident, Mr. Hasty, the driver, was fatally injured. His daughter, Rheeta Hasty, a passenger, then age sixteen, received serious personal injuries. His granddaughter by another daughter, Angela Michelle Hasty, a passenger, then twenty-two months old, also received serious personal injuries.

Suit was filed in the Circuit Court in Pascagoula, Jackson County, Mississippi, in behalf of Angela Michelle Hasty. The case was tried to a jury and resulted in a verdict for the railroad on November 15, 1973. Suit was then filed in behalf of Rheeta Hasty in both the Circuit Court of Jackson County, Mississippi, and in Chancery Court. Following the unfavorable verdict in the Angela Michelle Hasty case, Rheeta Hasty was allowed by the Court to dismiss the action then pending in Circuit Court on May 17, 1974. After attacking Chancery Court jurisdiction, being overruled, and having preserved the right of appeal, L & N defended the Rheeta Hasty case in Chancery Court on February 12, 1976. The Chancery Court rendered a verdict for the Plaintiff in the sum of \$125,000.00. This verdict was appealed, affirmed, and is now the subject of the present Petition for Writ of Certiorari.

Remarkably, on March 26, 1976, approximately six weeks after the Chancellor rendered his verdict in the



Rheeta Hasty case, the Circuit Court judge granted a new trial in the Angela Michelle Hasty case. This was two years and four months after the jury had rendered its verdict in favor of L & N in that case.

Finally, two suits were filed for the alleged wrongful death of Richard Hasty. The first was filed in the United States District Court at Biloxi, Mississippi. Shortly thereafter, Plaintiff was allowed to non-suit and dismiss the action pending in Federal Court over objections of L & N. On May 27, 1976, a second action was filed for the alleged wrongful death of Richard Hasty in the Chancery Court of Jackson County, Mississippi. Again, after objecting to the jurisdiction of the court, raising the same constitutional questions and issues in this case, and being overruled by the Chancellor, L & N proceeded to defend the case. Evidence has been taken by the Chancellor sitting without a jury and the case is pending his decision.

In this last action involving the alleged wrongful death of Richard Hasty, L & N argued the unconstitutionality of the Mississippi attachment in chancery statutes because of their denial of due process for failing to require adequate notice and opportunity to respond, and also, in their application to L & N in allowing plaintiffs in selected cases against certain defendants to avoid trial by jury. On the question of the constitutionality of the Mississippi statutes, the Chancellor, in ruling upon the wrongful death case, found that in the instant case, that involving Rheeta

Hasty, the Supreme Court of Mississippi had clearly ruled that the Mississippi attachment statutes are not unconstitutional in their application to the railroad.

At the time the Petition for Certiorari in this case was being forwarded for filing in this Court, the United States Court of Appeals for the Fifth Circuit was adding to the body of law which points to Mississippi's statute as unconstitutional. On October 6, 1978, the Fifth Circuit in *Johnson v. American Credit Co. of Georgia*, 47 Law Week 2229, held a Georgia prejudgment attachment unconstitutional on its face as violating the due process clause of the Fourteenth Amendment. The statute is similar to Mississippi's, except that, unlike Mississippi's statute, Georgia's required a pre-attachment bond. In that case, Johnson's automobile was attached on an allegation of "absconding debtor", on the mere filing of an affidavit and bond. The same kinds of deficiencies condemned in numerous United States Supreme Court decisions were found by the Fifth Circuit.

With *Johnson v. American Credit Co.*, *supra.*, the United States Supreme Court cases cited therein as well as in our Petition for Certiorari, and with *Mississippi Chemical Corporation v. Chemical Construction Corporation*, 444 F.Supp. 925 (S.D.Miss.1977), which specifically holds the Mississippi statute unconstitutional, we now find cases in conflict at *all* levels of the federal courts. Obviously, the Mississippi Supreme Court felt neither persuaded nor controlled by the specific holding of the *Chemico* case, or the law of the others.

It may be true that there is no constitutional right to a jury trial in a state court under the Seventh Amendment, as the Reply argues — although there should be — but, our primary contention in this regard is that the statute in Mississippi and its application to a non-resident domesticated corporation, is unequal discriminatory treatment. Residents, resident corporations and non-resident motorists with no property or debts in the state, are not subject to attachment and damage suit trials without jury, although they are subject to suit in State Court. It is quite another story for a non-resident, domesticated corporation, having property or debts in Mississippi as we have amply shown.

The Reply suggests as justification for the distinction the right of a non-resident to remove the case to Federal Court. Such a right is illusory. Diversity can be easily defeated, as here, by joining a defendant whose state of residence is the same as plaintiff's. Petitioner had no right to remove the instant case to Federal Court.

### CONCLUSION

The Reply seeks to mislead this Court as to Petitioners' complaints of denial of constitutional rights. From the time of the filing of the second of several pretrial motions and objections in the trial court, the Fourteenth Amendment, along with the Fifth and Seventh, was being raised.

Something has to be done about the Mississippi statute, already held unconstitutional by a United States District Court, and its continued use on non-resident, domesticated corporations.

What else can L & N legitimately do to raise valid constitutional issues in the courts of the State of Mississippi? L & N does not seek to avoid trial in Mississippi. It seeks to have the same rights as all other civil defendants. The desperate treatment of L & N in these cases demonstrates the need for this court to take jurisdiction and to correct this unjust and unfair arrangement made possible by the Mississippi attachment in chancery statutes. Plaintiffs should not be allowed to whipsaw the L & N between Chancellor and jury when the sole basis for doing so is to preserve the right to whipsaw. Section II of the Reply shows what is clearly an admitted fact that the railroad stands ready to defend itself within the State of Mississippi and to respond in damages when such awards are properly made.

The Mississippi statute is not only being tested again as to its constitutionality in a companion case under consideration in the trial court, but it is continuing to be applied unconstitutionally to others, and so long as the cited federal decisions remain on the books, the issue of the constitutionality of the statute and its application will continue to be raised by unfairly treated defendants in Mississippi. Recent decisions have brought the issues more squarely into light. They will not go away. The statute is unconstitutional on its face

and as applied. It would be unfair to Petitioner in the instant case to deny certiorari, only to have this Court rule in the future, as it most certainly will sooner or later, that the Mississippi statute is unconstitutional.

Certiorari should be granted.

Respectfully submitted,

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#### CERTIFICATE

I, RAYMOND L. BROWN, attorney of record for the Petitioners, Louisville & Nashville Railroad and Steve Havard, do hereby certify that I have mailed this day, by United States mail, postage pre-paid, three (3) true and correct copies of the foregoing printed Response to Reply Brief to John L. Hunter, Attorney for the Respondent, at his usual mailing address of Post Office Box 1287, Pascagoula, Mississippi 39567.

THIS THE \_\_\_\_ day of November, 1978.

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RAYMOND L. BROWN